

SERVED: November 24, 2006

NTSB Order No. EA-5260

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 24th day of November, 2006

_____)	
MARION C. BLAKEY,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Dockets SE-17831
v.)	and SE-17832
)	
M&N AVIATION, INC. and)	
SKY WAY ENTERPRISES, INC.,)	
)	
Respondents.)	
_____)	

OPINION AND ORDER

The Administrator and respondents appeal from the October 23, 2006 oral initial decision and order of Administrative Law Judge William R. Mullins,¹ which dismissed the Administrator's

¹ A copy of the initial decision, an excerpt from the hearing
(continued...)

emergency orders of revocation of respondents' air carrier certificates and, instead, instituted a "suspension pending whatever compliance requirements there are by the Administrator." We deny the appeals.

The Administrator's Charges

The Administrator's September 21,² 2006 emergency orders (which serve as the complaints in this proceeding) against M&N Enterprises, Inc. (M&N) and Sky Way Enterprises, Inc. (Sky Way) set forth numerous allegations. In the case of M&N, the complaint is 19 pages in length, contains 53 enumerated paragraphs (many with numerous subparagraphs), and alleges violations of more than 30 regulatory and statutory provisions. The complaint against Sky Way is 14 pages in length, contains 43 enumerated paragraphs (many with numerous subparagraphs), and alleges violations of eight regulatory and statutory provisions.³

(continued...)
transcript, is attached.

² Respondents each filed a notice of appeal of their respective emergency revocation orders on September 25, 2006.

³ Copies of the Administrator's emergency orders are attached to this opinion and order. As discussed in our summary of the evidence, respondents admitted certain factual allegations during the hearing. In addition, in its answer to the complaint, Sky Way admitted the allegations in sections I(1)-(5) and II(1)-(3) of the order against Sky Way; M&N admitted the allegations in paragraphs 1-8, 26-31, 33, 39, 40, and 48 of the order against M&N.

In light of the law judge's ruling, the issues on appeal, and the strict time limits applicable to emergency revocation proceedings, we cannot address every specific allegation in the Administrator's complaints. However, as explained at the hearing by FAA counsel, and demonstrated by this record, the gravamen of the Administrator's complaints pertain to whether M&N and Sky Way engaged in proper and authorized exercise of operational control of certain air carrier operations.⁴ Our opinion, therefore, focuses solely on the judge's order, which was based on issues of operational control.⁵

Summary of the Evidence

⁴ Although by no means the exclusive relevant legal authority that pertains to the Administrator's complaints or the issues of operational control, we note that 14 C.F.R. § 119.5(g) states, in pertinent part, that, "no person may operate as a direct air carrier or as a commercial operator without, or in violation of, an appropriate certificate and appropriate operations specifications." Further, 14 C.F.R. § 135.77 states that, "each certificate holder is responsible for operational control and shall list, in the manual required by § 135.21, the name and title of each person authorized by it to exercise operational control."

⁵ As discussed herein, the law judge dismissed the Administrator's orders, and made no specific findings regarding the specific allegations in the Administrator's complaints. Although we think it clear that the record supports some of the specific regulatory violations in the complaints, we note that the Administrator has not clearly and specifically appealed any failure by the law judge to make such findings, but, instead, on appeal argues, essentially, that the operational control issues identified in the record mandate revocation of respondents' certificates.

Respondents' cases were consolidated, over Sky Way's objection,⁶ and an evidentiary hearing was held in Orlando, Florida, October 17-20 and 23, 2006.⁷ Twenty-five witnesses testified, and approximately 73 exhibits were introduced into evidence. We endeavor below to set forth a detailed summary of the evidence, at least as it pertains to the issues of operational control, because the law judge did not and we think it important.⁸ This is particularly so, we think, because the record reflects the fact that the FAA is endeavoring to revise and expand its public guidance pertaining to operational control, and, in this regard, has initiated numerous public presentations with industry representatives to explain its current views regarding permissible and impermissible operations. See, e.g., Tr. at 1205-1216.

The first witness to testify for the Administrator was

⁶ Although Sky Way notes in its appeal that it objected to the consolidation, it does not pursue the issue further in its brief. In any event, we discern no clear error in the law judge's decision to consolidate the hearing.

⁷ Sky Way and M&N both challenged the Administrator's emergency determination. Chief Administrative Law Judge William E. Fowler, Jr., denied Sky Way's and M&N's challenges on, respectively, October 3, 2006, and October 2, 2006.

⁸ Our summary seeks to provide a detailed recitation of the relevant facts in the record, and, therefore, evidence that is not discussed has been deemed duplicative or not germane to the issues discussed in our analysis.

Inspector Donald Riley, who is part of a national FAA team currently conducting special emphasis investigations, mainly regarding issues involving operational control. Hearing Transcript (Tr.) at 47. He testified that the team conducted an investigation of American Flight Group (AFG), based in Annapolis, Maryland, in April 2006. During that investigation, the team concluded that AFG did not have operational control over the aircraft listed on its Part 135 operational specifications. According to Inspector Riley, AFG did not employ any pilots or mechanics, or own any aircraft. Tr. at 52. AFG was basically run out of the principal's home, and did not have adequate knowledge of operations ostensibly conducted under its certificate. In many cases, the crews of aircraft listed on AFG's certificate would merely send a cursory facsimile to AFG indicating basic information about a flight, but AFG would not otherwise have any involvement. See Exhibit (Ex.) A-1.⁹

⁹ Ex. A-25 is a copy of a classified advertisement from the May 2005 issue of Trade-A-Plane. The advertisement states:

PLACE YOUR AIRCRAFT ON our FAR 135
certificate. American Flight Group (AFG)
has 21 years of experience safely operating
all types of business aircraft worldwide....
Proving flights are not required. You pay
only a flat fee per month and a modest one
time certification fee. AFG will DBA your
business name allowing you to market and

(continued...)

During the investigation of AFG, the team noted an M&N-owned aircraft, N410MN, a 19-passenger Raytheon Beechcraft 1900. M&N, a Part 135 operator based in San Juan, Puerto Rico, has operational specifications to operate Cessna Caravan and other aircraft, but is not authorized to operate N410NM under its Part 135 certificate. The team collected and reviewed a "Lease and Operating Agreement, Dry Lease," executed between AFG and M&N. Ex. A-2. The investigation team determined that M&N appeared to be operating N410NM in commercial passenger service under AFG's certificate, but, essentially, independently, with no operational control exercised by AFG, in commercial passenger service.

Inspector Riley testified that the FAA team discovered that notwithstanding language in the AFG-M&N Lease and Operating

(continued...)

collect revenue in your own name. You pay for training, maintenance and operating costs. AFG will insure that your flight crews, maintenance tracking and trips are legal....

There is no evidence that M&N was lured, per se, by this advertisement; M&N President Jose Maldonado testified that he learned of AFG through a Raytheon Aircraft sales representative who provided a reference to another operator that utilized AFG. Mr. Maldonado testified that he bought the refurbished aircraft from Raytheon with the expectation of getting FAA approval for operating it on M&N's certificate, but that, because of unexplained FAA delays, he pursued temporary options to offset the financial burdens associated with the non-utilized aircraft.

Agreement, AFG was "delegat[ing] responsibility to main operational control over its transportation and commercial services" to M&N in the operation of N410NM. Tr. at 217. He noted that the agreement specified that M&N shall not operate as a principle in the sale of charter services using N410NM, which was not followed; and that even though the agreement specified that AFG will have direct control over the flight crews, the flights were operated utilizing M&N-paid pilots; and M&N was required to pay a monthly management fee of \$2250 to AFG. Tr. at 215-217.

According to Inspector Riley, while AFG was authorized by FAA at the time to conduct passenger operations with 10 or more passengers, M&N was not. "The Beech 1900 is a 19-seat aircraft and that was our concern, that M&N was operating that aircraft and basically renting AFG's certificate."¹⁰ Tr. at 212. Counsel for M&N stipulated that the flights of N410MN, between March 19th and April 25th, 2006, set forth in the Administrator's complaint at paragraphs 13(a) through 13(p), did take place, but did not stipulate that the flights were operated by M&N. Tr. at 204. Exhibit A-23 sets forth two passenger charter quotes issued on

¹⁰ On the basis of the team's findings, the FAA revoked AFG's air carrier certificate in May 2006.

M&N letterhead for M&N's Beechcraft 1900, N410NM; one to Blue Star Jets, for a trip between San Juan and Nevis, St. Kitts in April 2006, and one to Meridian Air Charter, for a trip between San Juan and Tortola, BVI in April 2006.¹¹

FAA Inspector Michael Cartelli testified regarding numerous aircraft time and cycle discrepancies discovered between N410NM records maintained by AFG and N410NM records maintained by M&N. Tr. at 578-613; Exs. A-37 through A-44. Inspector Cartelli admitted during cross-examination that two Airworthiness Directives that he referenced in his testimony were not applicable to N410NM, but he also noted that in one instance aircraft records indicated that the AD was accomplished and the time listed was incorrectly listed on the aircraft status report, and, in the other instance, there should have been a notation in the records that the inapplicable AD was reviewed and determined to not be applicable. Tr. at 624-625. Inspector Cartelli also testified that whether or not M&N took action to correct deficiencies identified in the maintenance records it maintained for N410NM, as asserted by counsel for M&N during

¹¹ Inspector Riley testified that after the FAA team's investigation of AFG, at the end of April, M&N sought to remove N410NM from AFG's certificate. Tr. at 209. M&N also sent a letter on May 1, 2006, to the San Juan FSDO indicating that, effective May 2, 2006, M&N was removing its aircraft, N410NM, from AFG's certificate.

cross-examination, he was not aware of any action by AFG to correct the maintenance record discrepancies; he testified that AFG, as the holder of the air carrier certificate, would, as opposed to M&N, be the entity responsible for maintenance. Tr. at 626. Inspector Cartelli testified that he did not notify M&N of the discrepancies, but, rather, notified AFG of them because N410MN was on AFG's operations specifications. Tr. at 627-628.

The FAA team expanded its investigation to M&N in San Juan. Once in San Juan, the team discovered operations that included numerous Shorts 330 and Shorts 360 cargo aircraft, a size and type of aircraft that M&N also was not certified under its operational specifications to utilize in Part 135 service. The Shorts aircraft, the team learned, were listed on the Part 135 certificate held by Sky Way, based in Kissimmee, Florida. The team, therefore, also expanded its investigation to include Sky Way. Tr. at 60-70; Ex. A-1.

As part of its investigation, the team collected and reviewed an "Aircraft Charter Agreement" and a "Management and Operating Agreement" executed between M&N and Sky Way. Exs. A-3 and A-4.¹² Inspector Riley testified that he noted the following

¹² The team also collected and reviewed an "Aircraft Charter Agreement" executed between Sky Way and Caribex Cargo (Caribex). Ex. A-5.

problems in the Aircraft Charter Agreement: (1) it specified that M&N would designate the routes to be flown; (2) it specified that, "the captain will consult with [M&N] when feasible on operational decisions which do not affect the safe operation of the flights" and "[M&N] may notify [Sky Way] of its preferences of where the aircraft should be diverted, if necessary"; (3) it specified that M&N was responsible for paying federal excise taxes on materials carried by air; and (4) it specified that M&N would be responsible for certain other payments that, according to Inspector Riley, are normally the responsibility of the carrier (Sky Way). Tr. at 78-82; Ex A-3. The Aircraft Charter Agreement also specifies that M&N agrees to "be responsible for loading, off loading, custom fees, immigration fees, parking fees, international fees, overnight fees ... or any other fees connected with the [M&N] operations." Ex. A-3 at 3. The Agreement also specifies that Sky Way is obligated to provide "all personnel, equipment, licenses, and any additional items required to provide the contracted charter services," including "fully qualified, licensed and experienced cockpit crews as necessary ... insurance coverages ... aircraft ... complete maintenance ... as required by law ... and shall ensure that all flight crew, maintenance personnel, flight dispatchers, and any other personnel shall be qualified to maintain such

equipment, supervise and conduct such flight and ground operations[.]” Ex. A-3 at 1-2. In addition, Inspector Riley testified that the Managing and Operating Agreement pertained to two Shorts aircraft that Sky Way sold to M&N, M&N leased back to Sky Way, and continued to be maintained on Sky Way’s certificate. Ex. A-4.

Inspector Riley testified that notwithstanding the language of the Managing and Operating Agreement, which purported to demonstrate that the M&N-owned aircraft were operated by Sky Way, interviews with M&N principals revealed that it was M&N that exercised operational control of the aircraft’s operations. Tr. at 80-84. For example, Inspector Riley testified that M&N, not Sky Way, was primarily communicating with operating flight crews and issuing information to the flights. He also testified that, during their investigation, contrary to the Agreement, they did not observe Sky Way issuing to M&N the aircraft assignments or the names of the assigned crew, nor did M&N transmit to Sky Way the load manifests prior to each revenue leg. Tr. at 83-84. Instead, according to Inspector Riley, in Sky Way’s operations room, in Kissimmee, the team observed that the pilots (who were flying into and out of San Juan, Puerto Rico) would call into Sky Way’s operations room and inform Sky Way personnel of the aircraft tail number, the crew aboard, and

the departure point and destination. Tr. at 85. "[T]hat was it." Id. Inspector Riley testified that Sky Way, as the operator of the aircraft, should have had enough information to determine if the crews were properly trained and qualified, and were legal under appropriate duty time regulations, but did not. Id. Inspector Riley testified that Sky Way only received monthly reports, five days after the end of the preceding month, for total flight time flown by each pilot; he explained that, for example, any pilots' flight time acquired outside of Sky Way/M&N flights would not be known to Sky Way in a manner sufficient to make a reliable decision about whether the crews were legal to fly. Tr. at 86. Inspector Riley also testified that Sky Way did not have any load information before the flights departed, and that this circumstance was insufficient to make an independent determination that the aircraft were properly loaded. Tr. at 85-86. M&N personnel "would actually receive radio calls after the Shorts departed with the departure time and then these individuals would call back to Sky Way and say that the airplanes departed ... and [M&N personnel] would fill out a sheet of paper called a Sky Way release form after the fact ... and fax[] it back to Sky Way[.]" Tr. at 91.

Inspector Riley also testified that M&N "basically ... schedules the crews, assigns the PICs, assigns the crews and

they routinely do this on a monthly and daily basis [for the Shorts aircraft]." Tr. at 89. According to Inspector Riley, M&N employee Carlos Ramirez "was in control of the daily schedule ... and would decide which Shorts was going to fly on the postal flights that day and which crews would fly." Tr. at 92. According to Riley, "some of the [Shorts] pilots are paid by M&N, some of the pilots are paid by Sky Way." Id. Sky Way trained the pilots. Tr. at 93. M&N paid for the training of its pilots. Id.

Inspector Riley also testified regarding his participation in an interview, during the team's inspection, of M&N's president, Jose Maldonado. Ex. A-6. Riley testified that Maldonado stated that M&N was interested in putting the M&N-owned Shorts aircraft on its certificate, but pending that occurrence, had entered into an agreement with Sky Way to have access to the lift capability of the Shorts aircraft. M&N had authority under its own certificate to operate smaller Cessna Caravans, but not the larger Shorts aircraft, and the Shorts aircraft were necessary to fulfill the obligations M&N had with the United States Postal Service to deliver mail in the Caribbean. Tr. at 95-101; Ex. A-6. Inspector Riley also testified that, during interviews with both Maldonado and M&N's chief pilot, Richard Carrion, the FAA investigators determined

that M&N had ultimate control over the crew and aircraft assignments. Tr. at 99-109; Exs. A-6 and A-7.

The FAA summary of the interview of Maldonado at M&N on June 29, 2006, which was signed by Maldonado on the same date, states, in relevant part, regarding crew and aircraft assignments:

M&N normally needs three or four Shorts. The additional aircraft are provided by Sky Way, and so are the pilots. All of the aircraft are on the specifications and certificate of Sky Way. The goal is for the M&N owned aircraft to be flown by M&N paid pilots, and for Sky Way-owned aircraft to be flown by one or more Sky Way pilots, and sometimes Sky Way-owned planes are flown by one or more M&N pilots.... Richard Carrion, Chief Pilot of M&N, and Ron Graef, Chief Pilot for Sky Way, coordinate beforehand, [Carrion] produces the aircraft/pilot schedule, and provides it to [Graef].... Of course, situations arise when aircraft and pilots have to be substituted. If a situation occurs, [Carrion] would contact the substitute pilots, then contact [Graef], and the aircraft goes.

Ex. A-6 at 2-3. The FAA summary of the interview of Chief Pilot Carrion at M&N on June 29, 2006, which was signed by Carrion on the same date, states, in relevant part:

The dispatcher on duty at M&N is responsible for keeping track of available aircraft, both Shorts and Caravans. The data is kept on a board in the dispatchers office. The Postal Service runs are on a scheduled basis. The only variable is the amount of freight. The schedule is prepared the night before listing available shorts. There is a separate listing for Caravans. The lists include aircraft and available pilots. For Sky Way owned aircraft the

pilots available may not be known because a Shorts might not be arriving until after the list is prepared. The dispatcher takes aircraft from the availability board, using the M&N owned aircraft first, and then the Sky Way owned aircraft. The dispatcher takes the pilot from the monthly schedule. Carlos Ramirez is the dispatcher who makes up the monthly pilot schedule. Carlos first lists the M&N paid pilots. Carlos is the Chief Dispatcher, and he knows the availability of our pilots. Carlos then calls whichever flight follower who is on duty at Sky Way, and asks him for the availability of the Sky Way Shorts pilots. When the schedule is complete, Carlos then shows me the list, and I approve it or make changes based on some special information I have that Carlos does not. That schedule is then used as the starting basis for the scheduling of aircraft and pilots for the M&N postal contract. After the schedule is prepared, Ron Graef, the Sky Way Chief Pilot, is faxed a copy of the schedule. The next month the daily schedules are made up based on the monthly schedule. The schedule is changed if the available mail does not require a Shorts, but can be handled by a Caravan. It is also changed based on changes as they occur, of pilot and aircraft availability. The dispatcher on duty just makes the changes, and does not discuss it with me, the Sky Way flight followers, or the Sky Way Chief Pilot.

Ex. A-7 at 2-3. Inspector Riley testified that his investigation revealed that Sky Way was not performing any daily scheduling duties regarding any of the Shorts aircraft operating in and out of San Juan. Tr. at 106.

Inspector Riley also testified that Maldonado stated, because the Shorts aircraft were based in San Juan, that the maintenance was performed on them in San Juan. The FAA record of interview of Maldonado states, in relevant part, that:

[During preflight preparations, if] there is an airworthiness problem the captain calls the Sky Way Director of Maintenance, and either corrects the problem or the aircraft does not fly.... The permanent maintenance records for the M&N owned Shorts are maintained at Sky Way's headquarters in Kissimmee, Florida. Since the aircraft are based [in San Juan], the maintenance is normally performed here, including required inspections. The maintenance on the M&N Shorts is normally handled by M&N mechanics. The M&N Director of Maintenance, Miguel Martinez, coordinates with Raymond Stover, the Sky Way Director of Maintenance, concerning all maintenance on the M&N owned Shorts. Whenever maintenance and inspections are performed, the maintenance logbook pages and pertinent work orders are first faxed, and then the originals are mailed, to Ray Stover at Sky Way.

Ex. A-6 at 3, 4-5.

Inspector Riley testified that M&N Chief Pilot Carrion described to the FAA investigators the daily Shorts operations into and out of San Juan in performance of the postal contract. The Shorts crews would radio M&N dispatchers after takeoff with their block times, and the M&N dispatchers would call the flight followers or operations person at Sky Way. Tr. at 109. Inspector Riley explained that, "in a normal operation, a flight release would be something prepared by the certificate holder to release his or her crew and aircraft for a specific revenue flight ... [but in] this case M&N dispatch filled out this form, which was called ... the Sky Way release form" and then faxed it to Sky Way. Id. "It was an after-the-fact, done by the entity who didn't have authorization to fly the Shorts." Id. Sky Way

was not, in actuality, releasing the flights. Tr. at 110; see also Ex. A-7 at 3-4. The FAA summary of the interview of Chief Pilot Carrion also states:

As far as I know, the captain examines the Sky Way Flight Log to see if there are any discrepancies on the Shorts, or there are any scheduled inspections. I do not know if they examine the aircraft Inspection Logbook Placard or the Airworth[iness] Directive and Compliance Record. The pilot fills out the Sky Way log prior to takeoff, at least those portions he can complete. The captain calls at the beginning of each leg for a series of daily trips. He does not call when the aircraft lands at the end of a leg. The captain calls the dispatcher on duty at M&N before each leg. The M&N dispatcher on duty then calls the flight follower on duty at Sky Way, and advises him of the pertinent flight information. When the crews' trips for the day are completed, the captain completes the log and Crew Trip Report and immediately faxes it to Sky Way. He leaves the originals in the M&N office, and we FedEx them to Sky Way once every week or two. About a month ago ... Sky Way developed a Sky Way Flight Release form.... This [form] includes, in a written format, the same information that used to be transmitted [to Sky Way by M&N dispatchers] by phone.... The captains call the M&N dispatcher, who [now] prepares the Sky Way Flight Release, and faxes it to Sky Way. The M&N dispatcher releases the Shorts aircraft, whether owned by Sky Way or M&N, that are used on the M&N postal runs. For the M&N pilots I keep track of flight and duty times.... Therefore, when M&N schedules the M&N Shorts pilots, I know when they are all right to fly in terms of block and duty time. I also keep track of the Sky Way paid pilots who are flying M&N postal runs, so I know if they are able to fly, so I will not schedule them if they have exceeded the flight and duty requirements. I do not advise Sky Way of my system or send them copies of my records. Sky Way, as far as I know, has to rely on the Crew Trip Report data and on the Monthly Flight and Duty Time form. That form is prepared by the fifth of each month for each of the days of the

preceding month, [to] include, for Part 135 and Part [119], all block and duty time. The pilots mail the form directly to Sky Way, and the form is not reviewed by me or any other M&N management individual.

Ex. A-7 at 3-4. Inspector Riley explained that, "if the pilots that are flying under your certificate, you're not aware of their total flying, other commercial flying or other duty time until the 5th of the next month[,] you can't determine at any given time whether they're legal to fly or not." Tr. at 111.

Inspector Riley also described the team's interview in Kissimmee of Sky Way's president, and partial shareholder, Thomas Loumankin. See Ex. A-8. Mr. Loumankin described the arrangement whereby Sky Way operated Sky Way-owned, M&N-owned, and Caribex-owned Shorts aircraft listed on Sky Way's certificate for the purpose of supplementing M&N's performance of a mail contract it had with the United States Postal Service for mail delivery in the Caribbean. Tr. at 122-125. According to Inspector Riley, although Sky Way had a leaseback arrangement for two M&N Shorts, and one Caribex-owned Shorts, the investigative team did not identify any evidence that Sky Way was, in fact, paying a lease fee to operate these aircraft on their certificate. Instead, the team discovered evidence that, "M&N and Caribex were paying Sky Way, basically, to have those aircraft on Sky Way's certificate." Tr. at 119. Sky Way

charged M&N \$500 per week for operation of the M&N-owned aircraft on Sky Way's certificate; Sky Way charged Caribex \$2,000 per month for operation of the Caribex-owned aircraft on Sky Way's certificate. Tr. at 126. Inspector Riley also sponsored a photograph of a bulletin board in Sky Way's operations center taken by a member of the FAA team during the first or second day of the team's inspection; the photograph shows a sheet of paper entitled "Puerto Rico Billing Info" that lists hourly Hobbs rates for the Sky Way-owned aircraft utilized for the postal contract service, and, for the Sky Way-owned and Caribex-owned Shorts aircraft lists, instead of a Hobbs rate, the following: "Cert. Use \$500/WK." Ex. A-11; Tr. at 136-138. Inspector Riley explained, "[t]hat's pretty much a red flag in my business that somebody's using a certificate as opposed to being the actual operator of the airplane." Tr. at 139. Inspector Riley also testified that the notice depicted in the photograph (Ex. A-11) was taken down by someone at Sky Way because it was not there when the inspectors returned on the third day. See Ex. A-48.

Inspector Riley also testified about the team's interview at Sky Way of Sky Way's chief pilot, Ronald Graef. See Ex. A-9. According to Inspector Riley, Graef stated that he would review some of the monthly schedules faxed from M&N, and that he

reviewed some of the pilot flight and duty times, but not on a daily basis. Tr. at 129. Inspector Riley testified that they discovered no evidence that Graef ever made changes to the M&N-provided schedules, and that Graef did not state to the investigators that he made any such changes to the schedules. Id. Graef was able to name the M&N-paid and the Caribex-paid, as well as Sky Way-paid, pilots that operated the Shorts aircraft on Sky Way's certificate. Tr. at 130-131. Inspector Riley testified that Graef stated that he calculated the duty-time qualification of the scheduled postal run pilots by adding 30 minutes to the crews' reported landing time, and then added an additional 10 hours to that time to determine when the pilots were able to fly. Tr. at 131. Inspector Riley explained that, according to 14 C.F.R. § 267(d), that is not the correct way to check flight duty time.

Inspector Riley also testified about the FAA team's observations while at the Sky Way facility. See Ex. A-9. He testified that the FAA knew that there were a couple of Sky Way aircraft airborne on postal contract runs, but that Mr. Graef explained to the team that Sky Way had no significant documentation on the flights because it is typically faxed in after the flight; the only documentation that Sky Way in Kissimmee had at the time was a Daily Tracking Sheet that showed

the tail number and the crew assigned. Tr. at 136.

Inspector Riley also testified about the Sky Way-Caribex Aircraft Charter Agreement. See Ex. A-5. He explained that the agreement was similar to the one executed between Sky Way and M&N. Tr. at 144. He identified concerns similar to those that he noted in his testimony about the Sky Way and M&N Aircraft Charter Agreement. See Ex. A-5; Tr. at 144-145. Inspector Riley also testified about the Management and Operating Agreement between Sky Way and Caribex¹³ for the Caribex-owned Shorts. See Ex. A-12. Again, Inspector Riley identified similar concerns to those he noted regarding the M&N-Sky Way Agreement. For example, Inspector Riley testified that in the normal course of business, and contrary to the terms of the Agreement, the aircraft's operator should pay for maintenance costs of an aircraft being operated by it under its certificate; but he also admitted that an operator could subcontract out such costs. Tr. at 149-151. Additionally, the Caribex-Sky Way Agreement also specified an aircraft management fee of \$2000, payable to Sky Way by Caribex, which Inspector Riley equated to the \$500/wk for "cert. use" posted on the bulletin board at Sky

¹³ The agreement is actually between Joseph Chatt, Inc., and Sky Way, but the record makes it clear that Joseph Chatt is a principal of Caribex. The distinction is immaterial for our purposes.

Way. Tr. at 151. He explained that:

[i]n a normal lease, the owner/lessor would lease an aircraft to a certificate holder for the certificate holder to use, and the certificate holder would pay that owner whatever amount is due to use that aircraft. In this case, it's reversed. It's the actual owner/lessor paying Sky Way \$2,000 a month to put this aircraft on its certificate.

Tr. at 151-152. Inspector Riley also noted that the Agreement specified that Caribex was to be responsible for all operational costs, and explained: "[O]nce again, with an air carrier operator, you know, they're in the business to fly airplanes and make money and they shoulder the cost of the operations. In this case, it's the owner here shouldering all of the operational costs." Tr. at 152.

Inspector Riley also testified to the Sky Way Dispatch Daily Flight Tracking Sheets that the team collected during its inspection of Sky Way's facilities. See Ex. A-13. He explained that these documents related minimal information about aircraft that were airborne at the time the FAA investigators inspected them, and provided insufficient information for Sky Way to exercise operational control over the flights. Tr. at 156-157. For example, the sheets did not contain weight and balance information; weather information; or information to determine that the crew was legal to fly, or that the crew was qualified for the flight. Tr. at 157. The Sky Way dispatch personnel, or

flight followers, did not designate the pilot-in-command, but, rather, they merely wrote the crew names down on the tracking sheets based on a phone call from Puerto Rico. Id. "It gave me a lot of concern.... I probably asked Mr. Graef five times for any trip paperwork, at all, and he said we don't get anything until the end of the day, after the trip, the total trip is done." Tr. at 155-156. Inspector Riley testified that Sky Way could not determine whether the Shorts aircraft were airworthy prior to the flight from the information that they had prior to the flights' initiation. Tr. at 156. The investigation determined from interviews that Sky Way essentially relied on the crew to determine airworthiness status of the aircraft prior to flying. Tr. at 157. Inspector Riley also testified that notwithstanding what the team subsequently learned from its investigation of M&N about a purported Sky Way Flight Release that was to be faxed to Sky Way by M&N personnel, Mr. Graef never presented such a document while the investigators were at Sky Way despite the numerous requests for any flight paperwork for airborne aircraft. Id.

Inspector Riley identified several copies of Sky Way Flight Release forms, obtained from M&N during its inspection of M&N. See Ex. A-14. The forms list the date; takeoff and landing times, and the route of flight; the pilot and copilot; any

loaders or "jumpseaters"; cargo weight; initial and final Hobbs times; and "time to inspection." Id. Inspector Riley testified that the investigation at M&N revealed that the information in the Sky Way Flight Release was taken down by M&N personnel from the airborne crews who contacted M&N via radio while airborne after departure. He explained that what was wrong with this scenario is that in a "normal release, the certificate holder has authority to operate the airplanes [and] generates the release to the crew, who takes the release and goes on their way." Tr. at 162. Similarly, Inspector Riley identified the Daily Flight Schedule that they obtained from M&N Chief Pilot Carrion. See Ex. A-15. Inspector Riley testified that Carrion explained to the FAA investigators that the schedule is created daily by M&N personnel. Inspector Riley testified that, although the FAA investigators asked Sky Way for schedule information, they did not receive the M&N-generated daily schedule set forth in Ex. A-15. The daily schedule, which is for June 28, 2006, lists Sky Way-owned Shorts aircraft, M&N-owned Shorts aircraft, other M&N-owned aircraft (presumably the Caravans, or the Citation jets, on M&N's certificate), and, notably, under "charter flights," N410MN, the Beech 1900, that neither Sky Way nor M&N are authorized to operate on their certificates. See Exs. A-7, A-11, and A-15.

Exhibit A-16 sets forth numerous flight logs for aircraft N386MQ, the M&N-owned Shorts utilized on the postal contract flights between May 27, 2006, and June 26, 2006. Respondent Sky Way stipulated that the flights did, in fact, take place. Tr. at 174. Exhibit A-17 sets forth numerous flight logs for aircraft N381MQ, the Caribex-owned Shorts utilized on the postal contract flights during the approximate same time period.

Inspector Riley testified about Exhibits A-18, A-19, and A-20, which contain invoices obtained by the investigative team from Sky Way, M&N, and Caribex. Tr. at 181-197. The invoices, specifically those set forth in Exhibits A-18 and A-19, indicate that Sky Way billed, respectively, Caribex and M&N for "management administrative" costs for the Caribex-owned and the M&N-owned Shorts aircraft operated on Sky Way's certificate. Id. The invoices contained in Exhibit A-20 indicate that Sky Way billed Caribex and M&N for hourly rates for operations of Sky Way-owned Shorts aircraft on the postal contract service routes.

On cross-examination, Sky Way introduced a copy of paragraph 1145 ("Background and Definitions") of Chapter 6 ("Operational Control") of FAA Order 8410.10, *Air Transportation Operations Inspector's Handbook*. See Ex. SK-3. Sky Way also introduced a copy of FAA Order 8400.83, *Responsibility for*

Operational Control During Part 135 Operations and the Use of a DBA (Doing Business As) Name, which was issued June 10, 2005.¹⁴

See Ex. SK-4. Sky Way attempted to demonstrate through these documents that the FAA investigative team acted improperly by not notifying Sky Way's principal operations inspector (POI) of its findings and concerns, or negotiating with Sky Way to correct perceived deficiencies in its operation. Inspector Riley testified that his team has developed its own operational control checklists, and that it was authorized to conduct its investigation as it did, including the fact that it worked, for investigative reasons, independently of the local Flight Standards District Offices (FSDOs). Tr. at 288-298, 448-352.

Sky Way also introduced a copy of a Federal Register notice and request for comments, published by the Administrator on October 25, 2005, entitled *Wet Lease Policy Guidance*. See Ex. SK-2; 70 Fed. Reg. 61684. The notice summary indicates:

It has long been contrary to Federal Aviation Regulations for an aircraft carrier to 'wet lease' an aircraft from an individual or entity that is not separately authorized to engage in common carriage. By this notice, the Administrator seeks comment on proposed policy guidance identifying those commercial arrangements that would be considered to be unlawful wet lease arrangements under these regulations as well

¹⁴ Order 8400.83 indicates on its face that its cancellation date is June 10, 2006, but FAA witnesses testified that they were unaware of any superseding guidance.

as those that would be permissible. Additionally, we seek comment on our proposed treatment of certain other commercial arrangements between air carriers and aircraft owners that - while not amounting to illegal wet leases - could nevertheless result in the air carrier impermissibly ceding operational control of flight to non-certificated entities.

Ex. SK-2 at 1. Sky Way sought to emphasize language in this notice that discussed pilot employment considerations; specifically, under the Section C-2 of the document, it states:

[T]he FAA does not intend to prohibit air carriers from using a pilot in part 135 operations simply because that pilot also is employed by the owner of the aircraft. A key question in such commercial arrangements is whether the carrier is obligated directly or indirectly to use the aircraft owner's crew. In this regard, a critical factor would be written acknowledgments by the carrier, the aircraft owner, and the pilots that the crew serves as the agents of the air carrier during all part 135 operations. An acknowledgement that the pilots are the carrier's agents (even where the pilots remain the employees of the owner, as evidenced, for example, by the owner's issuance of IRS Form W-2s) helps reduce any confusion as to which party has the authority and responsibility to conduct a safe for-hire flight.

Id. at 3. Sky Way admitted a copy of an "Agreement to Act As Agent" on Sky Way letterhead, signed by a pilot operating Sky Way-owned Shorts aircraft in service of the M&N postal contract service. See Ex. SK-5. However, Inspector Riley also testified that he found that M&N and Sky Way operated contrary to the Administrator's *Wet Lease Policy Guidance* that prohibits carriers from entering into arrangements that interfere with a

carrier's ability to make and implement safety decisions needed to comply with air carrier safety rules. "M&N handle[d] the daily assignment of aircraft, of pilots, and they also develop the monthly schedules for the certificate holder which is Sky Way." Tr. at 353; see also Ex. SK-2 at 3 ("In particular, [the FAA] think[s] it inappropriate for an aircraft owner or other non-certificate entity to determine who will be pilots assigned to a Part 135 flight.").

In addition, during cross-examination by respondents, Inspector Riley conceded that Part 135 operators are not required to have dispatchers. Tr. at 315. He also conceded that it could be construed that in all Part 135 operations the customer, ultimately, designates routes to be flown based on their required service from a particular point to another. Tr. at 318. Counsel for Sky Way also asked Inspector Riley if Sky Way did not in fact utilize a board in the operations center to track flight and duty time, but Inspector Riley testified that "Mr. Graef said that that board was not current and don't pay any attention to it." Tr. at 325-326. Inspector Riley admitted that Sky Way personnel explained to the FAA investigative team that they utilized Flight Explorer, a commercial flight tracking program that permits automated tracking of airborne aircraft. Inspector Riley admitted that he had no knowledge of any flights

that were not operated under IFR flight plans, and the flight locating requirements of 14 C.F.R. § 135.79 are not applicable to aircraft operating on IFR flight plans. Inspector Riley also testified that in his view his team identified serious operational control issues pertaining to the M&N and Sky Way operations, and operational control is a fundamental safety issue. Tr. at 339. However, Inspector Riley declined to adopt counsel for M&N's assertion that the FAA had abrogated its responsibility to public safety by not notifying either operator pending the team's completion of its investigation and the issuance of the emergency orders of revocation. Tr. at 339-344. Inspector Riley testified that he was unaware of any regulatory requirement that specifically requires operators to pay pilot salaries, to pay for maintenance, or to pay for insurance, but added, "those are all individual pointers to the big picture of operational control." Tr. at 344-345. Inspector Riley testified that payment of pilots is "a facet ... of operational control ... regardless of what agent agreements may be [executed]. We think that who controls the money has leverage on these pilots and who ultimately control these pilots.... It's not the whole picture, [but] it's one of the factors." Tr. at 354. Inspector Riley testified that another factor is the entity who hires the pilots, because "if you're hired by a specific entity,

you're going to show loyalty to that entity." Id. He testified that the FAA team's investigation revealed that M&N hired its Shorts pilots. Tr. at 356. Inspector Riley also testified that the FAA investigation team considered the FAA guidance set forth in FAA Order No. 8400.83, and concluded that Sky Way allowed operations by M&N contrary to that guidance. For example, Sky Way did not ensure that it alone conducted operations authorized on its operational specifications; Sky Way also failed to determine that all crewmembers were qualified to function as a required crewmember, in that several first officers operated in commercial service when they did not have a newly-implemented International Civil Aviation Organization (ICAO) requirement that they have a second-in-command type rating for international operations such that occurred out of San Juan; Sky Way failed to ensure that all crewmembers were in compliance with applicable flight duty rest requirements; Sky Way failed to ensure that all flight crews had access to all necessary information, such as weather, notices to airmen, and airport information; Sky Way failed to specify conditions under which a flight could be operated, such as fuel requirements, proper aircraft loading, and center of gravity limitations; and Sky Way was not capable of initiating timely actions when a flight could not be completed as planned. Tr. at 362-367.

In addition, Inspector Riley testified that the investigative team found no evidence during its investigation that M&N, Caribex, or Sky Way had declared that M&N or Caribex were operating through Sky Way as indirect air carriers. Tr. at 368.

Inspector Dale Donegan, an airworthiness inspector, corroborated the testimony of Inspector Riley that operations personnel at Sky Way's facility in Kissimmee were unaware of several aircraft that were in flight, and could not provide basic operational information, when queried about them. Tr. at 386-387. When he asked a flight follower when Sky Way gets the information, "[s]he said most of the time we don't get it until after they arrive where they're going.... And then they call in. Sometimes ... she said that it's an issue with cell phones" Id.

Inspector Henry Di Giovanni, who was also a part of the FAA special emphasis team, is an airworthiness inspector. He corroborated the testimony of Inspectors Riley and Donegan that Sky Way operations people appeared to not have basic information about aircraft in flight. On one occasion, when he asked about a flight he knew to be airborne, Sky Way dispatch personnel appeared to not have realized the aircraft was in flight, and, after Inspector Di Giovanni brought it to their attention, he

observed them log the flight onto the daily tracking sheet. Tr. at 407-408. Inspector Di Giovanni testified that he observed on June 29th that the "Puerto Rico Billing Info" had been removed from the bulletin board in Sky Way's operations center. Ex. A-11; Tr. at 409.

Inspector Daniel Castro, from the Miami FSDO, testified to his investigation of a Sky Way Shorts nose-gear collapse that occurred during a landing at St. Thomas, USVI. Inspector Castro testified that, during the interview of the accident captain, the captain explained that he contacted M&N's director of maintenance, Miguel Martinez. The captain stated that he normally contacted Mr. Martinez when they had maintenance problems. Tr. at 430-433. Inspector Diaz could not remember if the accident captain mentioned whether he ever contacted Sky Way personnel regarding maintenance problems. Tr. at 433.

Inspector Steve Nielsen, a member of the FAA special emphasis team, testified that he was tasked to go to Aguadilla, Puerto Rico, to inspect Sky Way Shorts aircraft there. Tr. at 449. He testified regarding a ramp inspection they performed on a Sky Way Shorts aircraft on June 27th. Inspector Nielsen testified to airworthiness deficiencies he observed with the aircraft, and that the captain was observed to have transported a passenger, a Caribex station manager, in a seat that was not

properly secured within the aircraft. Tr. at 455-475; Exs. A-27 through A-32. Inspector Nielsen testified that the pilots stated during questioning that they were scheduled by a Caribex employee, Frank Vodvarka, to crew the flight. Tr. at 462, 475. Inspector Nielsen also testified that he discovered that the first officer was operating as a crewmember without the ICAO/FAA requirement that he have a second-in-command type rating while operating on international flights. Tr. at 483. Inspector Nielsen testified that he discussed, at the captain's request, the ICAO requirement with Mr. Loumankin, who at the time was unaware of the requirement. Tr. at 484. Inspector Nielsen discovered another first officer who was operating without the ICAO-required second-in-command type rating. Id. Inspector Nielsen interviewed Captain Vodvarka, and testified that during the interview he began to wonder if Caribex was scheduling Shorts crews and pilots, rather than the assignments being made from Kissimmee. Inspector Nielsen explained that Captain Vodvarka seemed to know everything about the pilots' schedules and what loads needed to be flown, and that Captain Vodvarka explained to Inspector Nielsen that he was the point of contact at Caribex who ensured that there were crew available for the various flights. Tr. at 486-487. Similarly, Inspector John Loomis, a member of the FAA special emphasis team, testified to

his inspection of a Sky Way Shorts aircraft on the M&N ramp at San Juan, Puerto Rico, in June 2006. He testified to observing several airworthiness deficiencies, including the fact that the aircraft had a plywood floor covering improperly installed. Inspector Loomis also testified that the aircraft's copilot was using an outdated weight and balance form, even though the current form was available and onboard the aircraft. He testified that Messrs. Maldonado and Martinez became involved with the issue of the flooring, that nobody could find any information regarding the installation of the flooring, and, eventually, they decided to remove the flooring from the aircraft. Tr. at 516-576.

Inspector Kenneth Symons testified regarding his participation in the April 2006 inspection of AFG's facilities. His duties were to investigate AFG's training program and airman records. Tr. at 630. He testified that AFG was required under its operations specifications to maintain certain documents for the availability of pilots operating under its certificate, but, for example, AFG did not have an aircraft flight manual or pilot training manual for M&N's Beechcraft 1900, N410MN; navigational charts; or applicable airmen practical test standards. Tr. at 630-633; Ex. A-45. Inspector Symons also testified that when they audited pilot and training records maintained by AFG, most

of the checkrides that were accomplished for N410MN pilots were documented on M&N forms. Tr. at 634.

Inspector Ronald Katana testified regarding paragraph 40 of the Administrator's complaint against M&N. Counsel for M&N stipulated to the factual allegations in paragraph 40; i.e., that M&N tested under its Department of Transportation (DOT) drug and alcohol program an M&N-employed Shorts pilot for cause, reported the findings of the test to the FAA air surgeon, and terminated the pilot. Tr. at 641; M&N Complaint at 9; Ex. A-46.

Inspector Mark Weitzenhoffer is manager of the FAA's special emphasis team. Tr. at 662-665. He explained that the FAA had identified operational control compliance within industry as a program area that needed to be examined, and his team was fulfilling that task. Tr. at 665. Like Inspector Riley, Inspector Weitzenhoffer explained that the investigation began at AFG, and that the team was attempting to determine whether AFG "[f]or lack [of] better terms, rented their certificate ... to other companies and [had] given up their operational control." Tr. at 666. The investigation expanded to other companies involved with AFG, including M&N, and, subsequently, also to Sky Way.¹⁵ Id. Regarding AFG, Inspector

¹⁵ There is no evidence in this record that Sky Way had any
(continued...)

Weitzenhoffer testified that he interviewed AFG's president, David Russell, who described a scenario where AFG was essentially providing record or business services for companies that operated under its certificate. Tr. at 671. None of the aircraft on AFG's operating specifications were owned by AFG. Tr. at 671-672. AFG did not have exclusive use of any aircraft on its operating specifications. Tr. at 672. Inspector Weitzenhoffer testified that in the case of leased aircraft, the FAA normally expects "that the control, custody and complete operation is under the control of the certificate holder ... that is, that they have to be responsible for the maintenance of the plane, the operation of the plane ... [and so forth] ... [t]hey can't really do it any other way." Tr. at 672-673. Inspector Weitzenhoffer testified that the team's investigation of AFG revealed that AFG did not have control of the aircraft on its op specs because, for example, AFG was not aware of all flight activity that was occurring; AFG maintenance records were inconsistent with what the actual aircraft condition was; AFG could not tell the FAA whether the pilots flew for other companies, and, therefore, did not have accurate flight and duty time information; and, in response to requests by an FAA

(continued...)

affiliation with AFG, but, rather, only with M&N.

investigator about specific flights, AFG could not demonstrate that the aircraft, including M&N's N410MN, were airworthy or that the pilots met the qualifications of Part 135. Tr. 674-675. Inspector Weitzenhoffer testified that AFG was unable to demonstrate that, in reality, AFG had a close agent relationship with M&N pilots such that AFG was controlling or aware of what the M&N pilots were doing. Tr. at 676. He testified that M&N controlled maintenance on N410MN, including actual scheduling of maintenance, performance of maintenance, and payment for maintenance. Tr. at 676-677. Inspector Weitzenhoffer testified that AFG's chief pilot was new, lived in Georgia, and was employed by Midway Air Ambulance, and had not had any contact with M&N pilots.

Regarding the M&N-Sky Way relationship, Inspector Weitzenhoffer testified that he concluded that M&N, and not Sky Way, was "calling the shots," and Sky Way was not exercising operational control over the Shorts used to fulfill M&N's postal contract service. Tr. at 685. Referring to the definition of "operational control" set forth in 14 C.F.R. Part 1, Inspector Weitzenhoffer explained that M&N was exercising all the functions to originate, conduct, and terminate flights.¹⁶ Tr. at

¹⁶ Inspector Weitzenhoffer elaborated: "It's all the factors
(continued...)"

686. He testified that M&N exercised operational control over N410MN listed on AFG's certificate, and over the Shorts aircraft listed on Sky Way's certificate; and M&N did not have authority from the FAA to operate these aircraft. Inspector Weitzenhoffer testified that revocation was the appropriate sanction for Sky Way and M&N. Tr. at 692-693. On cross-examination, Inspector Weitzenhoffer was again asked by Sky Way's counsel about FAA

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connected with initiating the flights. It's the qualification of the company, it's the pilot training, the maintenance of the aircraft, were the planes ready to go, the knowledge of it. The same thing with conducting; how they deal with maintenance, en route maintenance, how they deal with the crew problems en route. Same thing with terminating. How do they deal with issues? It's all encompassing of -- it's not just, as someone suggests flight locating, it's encompassing of the whole essence of the 119 and 135 requirements for qualification to hold a certificate and operating specifications.... The certificate holder needs to have positive control of the aircraft. They need to be able to control the maintenance. They need to be able to control how the plane is being operated. It needs to be under control. And if the agreements are such that they do not have that kind of control and it can be operated by other people without the company's knowledge or maintenance performed, it's not under control of the very standards in 135 used to ensure safety, there's no assurance that they'll be complied with.... We -- you know, the agreements we get, when we look at them, one of the things that we examine is this is what the piece of paper says. Is this what the company's really doing? Now, sometimes we find that in practice there's inadvertent mistakes. Sometimes we find the paperwork is, for lack of a better term, deceptive, you know, the company will tell one thing to the FAA, but in reality will do something different, so it's not always -- the paperwork we look at, it's not always the truth of what's happening." Tr. at 688-690.

Order 8400.10 and the provisions in it regarding the POI informing a carrier and negotiating with a carrier regarding correction of operational control issues. Inspector Weitzenhoffer testified that, notwithstanding that guidance, his team's internal guidance was followed in the course of the FAA team's investigation, and the enforcement guidance as to the sanction of revocation was set in consultation with the chief counsel's office. He denied that the recommendation of revocation was inconsistent with the publicly available guidance that specifies that the POI should negotiate with carriers regarding operational control issues. He explained that the latter guidance pertains to field inspector performance, not the operational control special emphasis investigation he was managing or the FAA's enforcement policy. Tr. at 694-699.

Respondent Sky Way called as witnesses Sky Way's POI and principal maintenance inspector (PMI), respectively, Orlando FSDO Inspectors Richard Scheibel and David King. Both testified that they were not informed of the FAA special emphasis team's investigation, and, generally, that they did not make entries in the FAA's PTRS inspection tracking database regarding operational control issues. Tr. at 722, 724-727. Inspector Scheibel also testified that he traveled to San Juan on July 20, 2005, and February 22, 2006, to observe Sky Way's chief pilot,

Mr. Graef, conduct, respectively, pilot training and a check airman evaluation of a new Shorts pilot to be added to Sky Way's certificate. Tr. at 721. On cross-examination, Inspector Scheibel also identified a June 2006 PTRS database entry by another FAA inspector, a member of the FAA's special emphasis team, that noted Sky Way-M&N operational control concerns. Tr. at 728-729; Ex. A-49.

Sky Way also presented the testimony of Mr. Graef, Sky Way's chief pilot. Mr. Graef testified that he has been involved in a variety of commercial aviation operations, both as a manager and pilot, and holds both an ATP certificate and an A&P license with Inspection Authorization. He has been chief pilot at Sky Way since 1998. Tr. at 735-738. Mr. Graef testified:

In a general sense, I keep track of the schedules of the pilots, the aircraft we're using, the pilot's time and duty. I am directly involved in training the pilots, certifying the pilots, seeing that the various functions are carried out with the pilots. And, in many cases, we use our ... we call them dispatchers. They're not really licensed dispatchers. We delegate some of those things to them to keep track of for me.

Tr. at 739. Sky Way is not required to have licensed dispatchers, and they are sometimes referred at Sky Way as flight followers. Id. All Sky Way aircraft operate on IFR plans. Tr. at 740. He testified that M&N and Caribex have

recommended pilots, based in San Juan and elsewhere, to be interviewed by Sky Way, but Sky Way does not always hire these recommended pilots. Tr. at 742-743. All Sky Way new-hire pilots undergo a 90-hour ground school and at least six hours of flight training. Tr. at 744. Mr. Graef is a check airman, and he performs periodic reexamination of Sky Way pilots. Tr. at 747.

Regarding Sky Way daily operations, Mr. Graef testified:

[w]hen the pilots get to work, they need to call in, lets us know they're there. Once they're there, they know where they're going from there, what flight they're on, etc. Then they need to call in with certain information about the flight ... we double-check to make sure they know which airplane they're on. Normally, we know in advance, they know in advance, but we make them call and tell us the aircraft number to verify that, ... that the right crew is together, where they're going, [and] what time they're leaving[.]

Tr. at 753-754. He testified that most of the Shorts Part 135 flights into and out of San Juan are scheduled flights because of the postal contract service. Mr. Graef explained that the schedules vary, mostly month to month, in light of the varying mail delivery needs of the United States Postal Service. Tr. at 755. He testified that Sky Way is aware of all scheduled flights, and any on-demand flights, in advance, and everything goes through Sky Way's dispatch center. The dispatch center

utilizes automated flight tracking software. Tr. at 758-762.

Mr. Graef testified that he maintains the pilots' records in his office at Kissimmee. Tr. at 757.

Regarding scheduling of pilots and aircraft for the San Juan operations, Mr. Graef testified that the schedule typically isn't organized until about 10 days before the beginning of the month because that is when M&N gets load and schedule information from the United States Postal Service. Tr. at 762. In creating the schedule, he calls M&N Chief Pilot Carrion because "[w]e have to coordinate." Tr. at 763.¹⁷

¹⁷ Mr. Graef elaborated:

Generally, about a week before we're going to begin the month. That's -- from the way I understand it, that's about the time the Post Office would give M & N the schedule and any changes.... First I have to ascertain that the schedule hasn't changed.... Generally, I would call a gentleman by the name of Richard Carrion out at MN Aviation ... he's the Chief Pilot.... If [they are] going to use -- change a flight and use a Caravan on it this month [because] they've lowered the load on that, that it would make it uneconomical to use a Shorts on it, well, I need to know that. Some of his pilots were also employed by me. They flew a SkyWay aircraft; they flew an M & N Aircraft. I wanted to know which ones do you need this month because many times I had more than I needed in reality during the week and I would -- you know, he would tell me, well, can I use this fellow this month and I would say sure, and we'd fill in the blanks.... [A]fter we find out from the pilots directly whether ... they need time off ... then I determine who's available when. Tr. at 763-764.

(continued...)

Mr. Graef stated his pilots, regardless of whether they are paid by Sky Way or M&N, or Caribex, are loyal in terms of their activities as pilots for Sky Way. He explained: "[I]f they want to get paid, they get paid to fly airplanes. I tell them [if] they're not flying an airplane they're not going to get paid." Tr. at 768. He testified that he did not believe it made a difference whether pilots were paid by Sky Way or someone else, but that Sky Way entered into an agent agreement with all its pilots after reading the guidance by the FAA about such agreements; the Sky Way agent agreements were entered into after the FAA inspection team conducted its inspection of Sky Way's facility. Tr. at 768, 770. Mr. Graef also testified that he attended a seminar on operational control presented by the FAA in Ft. Lauderdale on May 23, 2006. Tr. at 769.

Mr. Graef also identified, over objection by the Administrator,¹⁸ what was purported to be a monthly pilot

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¹⁸ The Administrator's counsel objected to the admission of Exhibit SK-6. FAA counsel: "I've already checked with our inspectors and my co-counsel, Your Honor, and we have never seen this document. I just checked Mr. McDermott's discovery.... I did it twice just to double check." Sky Way's counsel: "It's my understanding that it was in the FAA file, Your Honor. It's difficult in a case like this, where we're dealing with 1,750 pages...." Administrator's counsel: "I object to the admission of this document.... Your Honor, (continued...)"

schedule for August 2006 that he approved. See Ex. SK-6.

"Richard Carrion would send [it] over [to me] after he'd type it up, after we discussed it. He had a secretary. I didn't." Tr. at 771. Exhibit SK-6 represents tabular scheduling data, and, at the bottom is a statement that indicates, "Sent to Sky Way for Approval on 7/27/2006," and, immediately below that are the words "Approved By" and a line for a signature; Mr. Graef testified that it is his signature on the form. Tr. at 772. There is no date next to Mr. Graef's signature. Ex. SK-6. On cross-examination, Mr. Graef could not convincingly explain the differences in the June 2006 schedule, which did not have a signature-approval line, that the FAA obtained in the course of its investigation. See Tr. at 814-817; Ex. A-50.

Mr. Graef testified as to how he tracks flight and duty time, utilizing paperwork faxed by pilots at the end of their trips. He explained:

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the Agency is prejudiced, number one, because there's a stamp down here that says sent to Sky Way for approval on July 27th. Approved by and it appears to be Mr. Graef's signature. This would have been evidence, I mean significant evidence that the Agency would have considered had it known about it. It was not in existence." ALJ: "Just show it to Mr. Weitzenhoffer. He can consider it. Maybe you want to withdraw your Complaint ... objection's overruled and it will be admitted." Tr. at 774-776.

[M]ost of the flights in Puerto Rico are rather boring and mundane. They leave at a particular time in the morning; they get back at a particular time in the morning. It's generally the same flight crew for a couple of days in a row with the same airplane every day unless there's unusual circumstances. The flight crew that comes in at 4:00 in the morning gets back by 6:30, sometimes 7:00 in the morning. They're then released. They come back in again at 4:00 the next day. I don't need a calculator to calculate that they got more than adequate rest in that sort of a situation."

Tr. at 778-780. He testified that he had in other circumstances worried about specific flight time requirements, "but I don't foresee it [presently] because I know what the schedule is."¹⁹

Tr. at 781. He explained that flight duty calculation requirements for scheduled and on-demand services are set forth, respectively, at 14 C.F.R. §§ 135.265 and 135.267. Under Sky Way's FAA-approved operations manual, Sky Way must utilize on-demand duty time calculations unless utilizing a written contract more than three days per week. Tr. at 788.

Mr. Graef testified that he was involved in the decision-

¹⁹ Mr. Graef also testified about a recent situation: "A pilot had flown the early Postal, came back in, did the bread run for Caribex, came back. They asked him if he was available to do a flight in the afternoon. He said sure. And, you know, I looked at the time. He should have been back well within. He then called me around 7:00 or 8:00 at night and said I've got a problem here. And I said to him, well, what do you want to do? I said you can't fly cargo. You either have to stay there tonight, or fly it home empty." Tr. at 781.

making and drug testing decisions of the M&N pilot. He believed it was proper to test the pilot under M&N's DOT-approved drug and alcohol program. Tr. at 791-793. Mr. Graef also admitted the Administrator's allegations that there were several occasions in June 2006 that Sky Way Shorts flights were operated with pilots who did not have the ICAO second-in-command type rating. Tr. at 794. He explained that he was aware of the requirement, and was having minor difficulties getting the proper documentation completed. Tr. at 794-797.²⁰

Sky Way also offered the testimony of Michael Hendrickson, one of Sky Way's flight followers or dispatchers. He testified that most of Sky Way's operations are scheduled operations. Tr. at 826. He testified that Mr. Graef keeps him apprised of any pilots that would not be qualified for a flight, and that Mr. Stover, the director of maintenance, also keeps the dispatchers apprised of any airworthiness problem with a specific aircraft. Tr. at 827-828. He claimed the dispatchers make this information available to anyone that calls for release of an aircraft. Tr. at 828. Mr. Hendrickson testified that he doesn't utilize a crew/aircraft schedule on a daily basis,

²⁰ Mr. Graef did not testify that he acted to ensure that the crews would not be scheduled until these requirements were satisfied.

stating, "the crews have already been scheduled and unless there is some issue with one of the crew members not being able to fly, or a defect of the aircraft, I wouldn't be involved. It would be the Chief Pilot's responsibility." Tr. at 830-831. He testified that the dispatchers are aware of the scheduled flight, and when crews call to check in, they check the status board to ensure that there is no flight status problem for the crew or any maintenance notice of airworthiness issues for the aircraft. Tr. at 832. He testified that when crews fax their paperwork in at the end of their trips for the day, the dispatchers check to ensure that all the information is provided and that, compared to the company's records, the time calculations are correct. Tr. at 835. On cross-examination, Mr. Hendrickson testified that he does do calculations to ensure that crew duty times are satisfied, but that this is generally only necessary for on-demand flights. Tr. at 843-845. He does not do anything to ensure an aircraft is airworthy prior to a flight; rather, "that's the pilot's responsibility, generally," and the information about weight and balance and loading information is typically faxed in by the crew at the end of a trip. Tr. at 847-849.

Respondent also presented the testimony of Raymond Stover, Sky Way's director of maintenance since 1990. He testified

that, in the maintenance context, operational control means "maintaining airworthiness at all times." Tr. at 854. He testified that he ensures that proper maintenance is performed on all aircraft operating on Sky Way's certificate by entering the information from the flight logs that come in on a daily basis and entering it on a computer; utilizing Lotus and a commercial program called Airware, he can track all maintenance requirements. Tr. at 854-856. He testified that he reviews his maintenance requirements three times a week, and for the San Juan based Shorts he utilizes contract maintenance by DynCorp at Aguadilla and M&N at San Juan; he stated, without elaboration, that he supervises this work. Tr. at 856-857. Later, he added: "I contact the person that I'm going to assign the task to ... and I say this is what needs to be done. They acknowledge what needs to be done. They acknowledge that they have the paperwork and anything that they need I send them, and they perform the work." Tr. at 860. After maintenance work is performed, he explained, "once I receive all the paperwork and I review it and make sure everything is fine, then I release the aircraft[.]" Tr. at 863. Mr. Stover testified that he maintains the records of all aircraft at Sky Way's facility in Kissimmee. Tr. at 858. Mr. Stover did not provide any more details about his practical exercise of operational control over maintenance aspects of Sky

Way operations.

Respondent Sky Way also presented the testimony of Thomas Loumankin, the president of Sky Way. He has functioned as Sky Way's president since its inception in 1979. There are 10 aircraft, all Shorts, on Sky Way's operating certificate. Tr. at 921. Sky Way employs approximately 40 people. Tr. at 922. Mr. Loumankin owns 50 percent of the company. Tr. at 918.

Mr. Loumankin testified at length about the contractual relationship Sky Way had with M&N and Caribex. Essentially, he explained that the postal contract that M&N has requires variable lift capacity. Sky Way provided some of this capacity with its Shorts, which are capable of carrying about twice the load of the Caravan's on M&N's certificate. M&N purchased the Shorts from Sky Way with the intent of ultimately putting the aircraft on M&N's certificate. The hourly rate negotiated for the M&N utilization of Sky Way Shorts aircraft is significantly less than the normal rate Sky Way would charge, because M&N provides maintenance facilities, hangar space, fuel, and other necessities. Tr. at 923-926. He testified that he formulated the Sky Way agreements between M&N and Caribex based "almost word for word" on a contract that DHL had earlier provided to Sky Way. Tr. at 930.

Mr. Loumankin testified that Sky Way makes its San Juan

pilots obtain the weather information and NOTAM information, to ensure that they get accurate information rather than providing information obtained in Florida. He testified that he believed the FAA inspectors cast inaccurate aspersions on some of Sky Way's actions. Tr. at 930-931. For example, he explained that Sky Way's operations manual specifies that pilots are responsible for getting the weather. Tr. at 940-941. Similarly, he testified that under Part 135 regulations the pilot-in-command has the authority to release a flight. Tr. at 946. He confirmed the accuracy of the testimony provided by Messrs. Stover, Graef, and Hendrickson. Tr. at 931. Mr. Loumankin testified that he believed that

[w]hen the FAA team arrived ... they were predisposed to shut us down. The inspectors that walked in the door said, wow, they actually got an office. They got books. They got people.... Eighty percent of some of these allegations that they're making in their indictment, if they would have asked us, I think we could have resolved it without coming here. They were on a fact finding mission. They were gathering data. They didn't ask us to explain it. They didn't ask us to qualify it. It was gather all the data and see how quickly we can convict them. And that's my impression.

Tr. at 945-946.

On cross-examination, Mr. Loumankin testified that the \$500 per week payment charged by Sky Way to Caribex and M&N for, respectively, the Caribex-owned and the M&N-owned Shorts was for

"management and administrative costs ... to offset costs of the telephone, my director of maintenance's time, the hours spent keeping them abreast of what's current on the airplane, how they should be [acquiring] their certificate [from the FAA], the manuals that we're providing to them ... I mean we're providing a whole gambit of things for that." Tr. at 952. Mr. Loumankin denied that there was any fee for "cert. use," but conceded that the notice set forth in Exhibit A-11 was posted in Sky Way's operations center. Tr. at 952. He agreed that M&N employs the loaders for the postal contract service, and Sky Way doesn't have anything to do with the M&N loaders. Tr. at 953. He also conceded that Sky Way's agreement with M&N set forth in Exhibit A-4 specifies that M&N employees shall not be construed as agents of Sky Way; he conceded the same point regarding Sky Way's agreement with Caribex set forth in Exhibit A-5. Tr. at 955-956. He also conceded that the pilot-agent agreements were all executed after the FAA team's inspection of Sky Way. Id.

Respondent M&N called Inspector Ramon Ruiz, M&N's PMI from the San Juan FSDO. Inspector Ruiz testified that he did a conformity inspection in March 2006 of N410MN in preparation for a series of proving flights for M&N to receive authorization to operate the aircraft on M&N's certificate. During that inspection, Inspector Ruiz discerned some airworthiness

discrepancies, which the operator corrected. Tr. at 1000-1001. He has never filed a violation against M&N's maintenance personnel. He was not informed by any FAA personnel that N410MN was considered unairworthy. Tr. at 1001-1002. Similarly, respondent M&N presented the testimony of Inspector Ismael Ortiz de Jesus, M&N's former POI. He testified that he did not find M&N to be noncompliant with FAA requirements. Tr. at 1006. He testified that he arranged for the proving runs for N410MN, but they were cancelled by the FAA in May 2006 and he did not know why. Tr. at 1006-1009.

M&N presented testimony from Rafael Gilestra, a former FAA Inspector and POI, who now works as a consultant to M&N. He testified, essentially, that most of the discrepancies noted between the AFG records and the M&N records for N410MN were due to errors in the AFG record-keeping; he also testified that he ensured any actual deficiencies with N410MN's records were corrected. Tr. 1014-1022. On cross-examination, he also conceded some of the allegations pertaining to the maintenance records of N410MN set forth in the Administrator's complaint against M&N. Tr. at 1029-1048.

Finally, M&N presented the testimony of Mr. Maldonado, the President of M&N. Mr. Maldonado testified that, in his winning bid for the postal contract, he specified that Sky Way, among

others, were subcontract service providers. He testified that the Postal Service required that there be one contract for mail service in the Caribbean, and created a bid which allowed one carrier to create a network with other subcontractors to provide the service. Tr. at 1059. Mr. Maldonado testified that he agreed with the testimony of Messrs. Loumankin, Graef, Stover, and Hendrickson as it related to operational control issues. Tr. at 1064-1065. Mr. Maldonado testified that he did not agree with the accuracy of the interview summary the FAA inspectors prepared of his interview during the FAA team inspection of M&N, which Mr. Maldonado nonetheless signed, and sponsored a statement that he wrote and sent to the FAA approximately 13 days after the interview. Tr. at 1068; Ex. MN-10.

Regarding the AFG operations, he testified that M&N acted properly. Tr. at 1074-1084; Exs. MN-1 and MN-3. He also testified to a series of letters that M&N wrote or had counsel write to various FAA personnel seeking guidance about how to ensure M&N operated to the satisfaction of the Administrator, and claimed that M&N received no information in response until M&N was served with the Administrator's revocation order. Tr. at 1085-1099, 1110-1119; Ex. MN-14.

On cross-examination, Mr. Maldonado denied that the postal contract for mail service, and the fact that Sky Way was a

subcontractor for that service, equated to M&N exercising operational control over mail service operations on Sky Way's certificate. Rather, he explained, "I have a contract ... which requires me ... to supervise the movement of the mail by my company and all the subcontractors." Tr. at 1134.

Finally, respondent Sky Way presented the testimony of aviation attorney Gary Garofalo. Essentially, Mr. Garofalo testified, in relevant part, that there is no requirement that a Part 135 pilot be paid by the certificate holder. Tr. at 242-245. Mr. Garofalo also testified that it was his opinion that Sky Way maintained proper operational control, based on his review of the applicable, published FAA guidance. Tr. at 239-247. He also testified that M&N and Caribex were, essentially, functioning as indirect air carriers, and he explained that there are no licensing requirements for indirect air carriers. Tr. at 247-254. Mr. Garofalo explained that this was an important distinction, in cargo-only operations, from the facts applicable to the Board's decision in Administrator v. Darby Aviation, NTSB Order No. EA-5159 (2005). Tr. at 254. In rebuttal, the Administrator offered the testimony of Dayton Lehman, Deputy Assistant General Counsel of the DOT. Mr. Lehman disputed Mr. Garofalo's assessment of the applicability of DOT precedent regarding freight forwarding operations, which, he

said, related solely to issues of economic authority.

The Law Judge's Decision

At the conclusion of the hearing, as mentioned, the law judge did not make specific findings of fact regarding most of the numerous allegations that are contained in the Administrator's lengthy complaints,²¹ but, rather, appears to have treated the numerous allegations exclusively in the context of whether the Administrator had demonstrated loss of operational control. The law judge nonetheless concluded that it is "obvious ... [that the respondents] have fallen short under the area of operational control *as perceived by the [special emphasis team]* ... [b]ut the [team] equals the FAA and, so, therefore, there are some operational control issues." Tr. at

²¹ The law judge does appear to specifically reject the Administrator's allegation that Sky Way improperly installed a torque pressure transmitter on one of its aircraft, but, again, did not make any express finding of a violation. Tr. at 1320 ("They did everything right and even in a technical sense if it was wrong it certainly doesn't show any kind of operational control issue. And yet ... we spent a lot of time on that issue. And if the approach to that issue is in any way indicative of the way the [special emphasis team] goes about some of these other issues, then there is some cause for concern."). To the extent the Administrator's appeal can be construed to expressly appeal that ruling, we agree with the law judge that this record does not support the Administrator's allegations regarding the torque pressure transmitter by a preponderance of the evidence.

1311 (emphasis added).²² However, the law judge observed that the Administrator had not demonstrated any pilot training deficiencies, scheduled maintenance issues, pilot qualification issues of any significance, or falsification of documents ... and concluded that, "if there are not any of those kind of problems, which is the core to me for a certificate revocation, then certificate [revocation] would not be appropriate."²³ Tr. at 1325. Therefore, the law judge did not affirm the Administrator's emergency orders of revocation, but, rather, ordered, on the basis of the issues regarding operational

²² The law judge also stated: "There was a flow of money issue here that the Administrator, the [special emphasis team] feels wasn't consistent with operational control. And to the extent that this is a call by the Administrator I can only say that's right... They said that that wasn't right. So it wasn't right." Tr. at 1315; see also Tr. at 1318 ("the Administrator believes that that's an operational control issue, and like I said, that's their call. But under the terms of the postal contract, it looks like that was the way it was supposed to work out.").

²³ The law judge noted, however, that the FAA has yet to complete and publish its long-awaited update to industry guidance regarding operational control; he opined that, "the issue of operational control really needs to be enforced just the way [FAA Order 8400.10] suggests, and ... where there are issues the Administrator should set down and negotiate them [with individual carriers]. Tr. 1323-1324. The law judge similarly expressed concern about the fact that the special emphasis team does not have published rules or public guidance. Tr. at 1323, 1324. We note that the record contains testimony that the Administrator's guidance contained in Order 8400.10 is not applicable to special emphasis investigations of systemic loss of operational control.

control attested to by the Administrator, "suspension of each certificate ... pending compliance with whatever requirements the Administrator may determine needs to be done."²⁴ Tr. at 1325-1326.

Issues Raised on Appeal

On appeal, the Administrator argues that the law judge erred in modifying the order of revocation to impose an indefinite suspension. In support of her appeal, the Administrator argues her view of the evidence, which is, essentially, that Sky Way impermissibly ceded operational control and "rented" its certificate to M&N and Caribex, M&N impermissibly exercised operational control over aircraft it was not authorized to operate, and both M&N and Sky Way demonstrated an intent to deceive the Administrator regarding the true nature of the Shorts operations. She argues that M&N and Sky Way have

²⁴ We note that although the nature of the law judge's decision mandates very little deference on our part, we disagree with respondent Sky Way's characterization of the law judge's decision as one that found no instance of Sky Way's loss of operational control and that he believed that nonetheless he had to defer to the FAA's opinion on such matters. Rather, as we read the law judge's opinion in the context of the entire record (including comments he made during the hearing), we think that, while he expresses some skepticism regarding certain inferences the Administrator sought to draw from certain evidence, he was nonetheless aware that the Administrator, as the regulating authority, had serious, legitimate concerns about respondents' operations.

demonstrated a lack of qualification to hold their certificates, and, therefore, under Board precedent, revocation is the appropriate remedy.²⁵ She argues that the law judge did not adequately explain the rationale for his sanction modification.²⁶ In reply, Sky Way argues that an accurate reading of the law judge's decision belies the Administrator's argument that the law judge found Sky Way lacked qualification to hold an air carrier certificate. Rather, Sky Way asserts that the law judge's decision reflects his opinion that Sky Way was exercising, or attempting to exercise, operational control, but that the law judge determined he must defer to the FAA inspectors' opinion that Sky Way exhibited operational control

²⁵ The Administrator's appeal does not appear to challenge the law judge's general rejection of her complaint, but, rather, focuses on the issue of operational control as "the crux of this case." Admin. Appeal Brief at 34. In light of the law judge's failure to make specific findings, and what we discern to be the Administrator's acquiescence to the law judge's dismissal of the specific regulatory and factual allegations set forth in her complaints, we do not address the specific enumerated allegations in her emergency orders.

²⁶ In this regard, the Administrator cites our decisions in Administrator v. Musquiz, 2 NTSB 1474, 1477 (1975) (In those cases in which all of the violations are affirmed, we believe it is incumbent on the law judge to offer clear and compelling reasons for reducing the sanction), and Administrator v. Air Maryland, 6 NTSB 1157 (1989). As we discuss below, we note that a fair reading of the law judge's decision does not indicate that all violations contained in the Administrator's complaint were affirmed.

deficiencies. Sky Way also sets forth its view of the evidence, in rebuttal to the Administrator's characterization. Similarly, M&N, in reply to the Administrator's appeal, argues, essentially, that the Administrator's appeal does not accurately summarize the evidence or the nature of the law judge's order.

Sky Way, in its appeal, argues that the law judge "concluded that the first-hand testimony and other evidence ... does not show a loss of operational control" and therefore concluded that revocation was not warranted. Further, Sky Way argues that the law judge erroneously concluded that he had to nonetheless defer to the FAA witnesses' opinions that there were operational control problems, that the preponderance of the evidence shows there was no loss of operational control, and that M&N and Caribex were rightfully acting as indirect air carriers and their activities did not interfere with Sky Way's operational control. In reply, the Administrator argues that the evidence supports her revocation order.

M&N argues, on appeal, that the law judge erred in concluding that he must defer to the opinions of the FAA witnesses regarding lack of operational control. According to M&N, the evidence does not demonstrate that M&N is "unworthy" of holding its air carrier certificate, but, instead, demonstrates M&N's efforts to operate properly. M&N notes that it removed

its aircraft from the AFG certificate when it became apparent that the FAA disfavored the arrangement, and that operational control "was exercised by Sky Way, insofar as that concept was known and defined at the time." M&N argues that it sought to satisfy the FAA's requirements, but its efforts to communicate with FAA personnel were unsuccessful and, ultimately, the operational control requirements remain "an in nubilus concept."²⁷ M&N characterized the Administrator's investigation and revocation proceedings as "motivated by an agency bent on demonstrating that the Teterboro tragedy was an aberration rather than the predictable result of its regulatory indolence." In reply, the Administrator argues that the evidence supports her revocation order.

Discussion

The FAA indisputably has the right and obligation to monitor and regulate permissible commercial flight operations. However, we acknowledge that within this paradigm there can be

²⁷ We note that Exhibit MN-14 consists of numerous letters from M&N's counsel to various FAA legal officials, and the record in this case indicates that this correspondence went largely unanswered. The letters were sent to FAA before and after the inspections that the FAA team conducted at M&N and Sky Way. The letters, on their face, appear to indicate good faith effort by M&N to correct any concerns the FAA had regarding its operations.

legitimate efforts by operators to make arrangements and conduct business in a fashion that makes economic sense. This case involves, in some respects, circumstances where these sometimes opposing motivations are in conflict. Therefore, we state unequivocally that, barring arbitrary or capricious regulatory oversight, the Administrator is the principle arbiter of the appropriateness of specific operational behavior and arrangements in the context of FAA regulations. On this record, we find adequate support for the Administrator's conclusion that M&N improperly assumed unauthorized operational control, and that Sky Way impermissibly ceded operational control for flights for which it, alone, was responsible.

As a preliminary matter, we note that our decision accounts for the differing factual testimony regarding the scheduling of Shorts flights in support of the M&N postal contract service. Upon reviewing the record as a whole, we think the preponderance of the evidence demonstrates that M&N, on at least a number of occasions, assumed actual control of the scheduling or assigning of aircraft and pilots. We base this conclusion on the testimony of Inspector Riley, and on the contemporaneous statement of M&N Chief Pilot Carrion taken during the FAA

inspection team's inspection of M&N's facilities.²⁸ Mr. Carrion stated that the aircraft and pilot schedules are "changed based on changes as they occur, of pilot and aircraft availability. The dispatcher on duty just makes the changes, and does not discuss it with me, the Sky Way flight followers, or the Sky Way Chief Pilot." Ex. A-7 at 3.

As discussed in our opinion in Darby, and this record, according to 14 C.F.R. § 1.1, "operational control" means the exercise of authority over initiating, conducting or terminating a flight. FAA's Order 8400.10, *Air Transportation Operations Inspector's Handbook*, in Chapter 6, titled *Operational Control*,

²⁸ In this regard, while we acknowledge the testimony of Messrs. Graef and Loumankin, the purported Graef-approved pilot schedule set forth in Exhibit SK-6 is entitled to little or no weight. As we said in Administrator v. Maryland, in a different context but the principle is nonetheless relevant to the circumstances here, "respondent's failure to supply complete records, at the time of the inspection, tends to establish that there were then no such records. To permit carriers to demonstrate their compliance ... after an inspection would seriously impair the FAA's ability to enforce such regulations." 6 NTSB 1157, 1161 (1989). Similarly, while the record reflects respondents' attempts to disavow the FAA summary of statements M&N and Sky Way officials made by the FAA inspectors during their inspections, we have been provided no convincing evidence that the FAA summary of interviews were materially inaccurate; indeed, the summaries were signed by the officials whose statements are recorded, and the statement summaries reveal handwritten, factual corrections that were initialed by the interviewees. Under the circumstances, we find these contemporaneous records of interviews to be persuasive evidence.

states (in paragraph 1145 B (1)) that operators exercise operational control by making those decisions and performing those actions on a daily basis that are necessary to operate flights safely and in compliance with the regulations, and lists the following general operational control functions: crew and aircraft scheduling; accepting charter flights from the public; reviewing weather and notices to airmen (NOTAMs); and flight planning. Additional, specific operational control functions listed in paragraph 1145 C include:

- a. Ensuring that only those operations authorized by the operations specifications are conducted;
- b. Ensuring that only crew members trained and qualified in accordance with the applicable regulations are assigned to conduct a flight;
- c. Ensuring that crew members are in compliance with flight and duty time requirements when departing on a flight;
- d. Designating a pilot-in-command for each flight;
- e. Providing the pilot-in-command and other personnel who perform operational control functions with access to the necessary information for the safe conduct of the flight (such as weather, NOTAMs, and airport analysis);
- f. Specifying the conditions under which a flight may be dispatched or released (weather minimums, flight planning, airworthiness of aircraft, aircraft loading, and fuel requirements);
- g. Ensuring that each flight has complied with the conditions specified for release before it is allowed to depart;

- h. Ensuring that when the conditions specified for a flight's release cannot be met, the flight is either cancelled, delayed, re-routed, or diverted;
- i. Monitoring the progress of each flight and initiating timely actions when the flight cannot be completed as planned, including diverting or terminating a flight.

It is clear that only Sky Way, and not M&N, had authorization from the FAA to operate the Shorts aircraft. Thus, the aforementioned obligations applied to Sky Way for all Shorts flights.

Applying this guidance to the evidence in this case, including the language of the agreements between Sky Way and M&N and the method in which the operations purportedly governed by these agreements were actually carried out from day to day, it is clear that the Administrator has demonstrated shortcomings in Sky Way's exercise of operational control.²⁹ For example, on several flights, pilots operating Caribex runs were scheduled and flew on flights when they did not have necessary type rating qualifications. Sky Way did not always designate the pilot-in-command for each Shorts flight (but, as discussed above, M&N

²⁹ We have previously recognized that the matter of operational control is not dependent upon the wording of an agreement, but upon all of the indicia of operational control that surround any flight. Administrator v. Dade Helicopter Jet Services, Inc., 6 NTSB 374 (1988).

personnel did instead). There is no indication, on this record, at least, that Sky Way effectively ensured that aircraft were loaded in accordance with conditions it specified prior to flights being released. The FAA demonstrated that Sky Way operations personnel were sometimes unaware of flights in progress.³⁰

It is also axiomatic that, to the extent the obligations pertaining to operational control are carried out by a carrier without authorization to conduct particular flights, the carrier is impermissibly operating as a commercial operator contrary to federal regulations. See 14 C.F.R. § 119.5; 49 U.S.C. § 44711(a)(4). In the case of M&N, this appears to have occurred at least with regard to the admitted commercial flights of N410MN. In the case of the Shorts operations, the evidence demonstrates that on some flights, at least, M&N engaged in activity that should solely be the responsibility of the certificate holder, Sky Way, in assigning aircraft and crews to particular flights.

Considering the arguments on appeal and the totality of the evidence, we are convinced that the Administrator has presented

³⁰ We focus our discussion here on M&N and Sky Way, for the Administrator's additional allegations regarding Sky Way's relationship with Caribex do not materially affect our analysis.

legitimate concern about the operations of M&N and Sky Way. However, as the law judge alluded to, there is also ambiguity in this record about significant matters of operational control. For example, it was asserted by Sky Way officials that many of the operational control requirements (at least those not expressly discussed above in our findings of loss of operational control) are delegable by Sky Way to the pilot-in-command. This may or may not be the case, but the Administrator has not explained this adequately for us to assess some of the purported instances of Sky Way's loss of operational control. We note that there appears to be no dispute that Sky Way did have all Shorts pilots appropriately listed and approved on its operations specifications, regardless of whether they were paid by Sky Way or M&N (or Caribex).³¹ In addition, while the record indicates that Sky Way pilots routinely communicated with M&N officials, and to Sky Way through M&N officials, and this

³¹ We are also mindful, here, of course, of the Administrator's public guidance regarding proper agency relationships between an operator and flight crewmembers; but here, again, some of the FAA witnesses' opinions appear to contradict the guidance that pilots do not have to be employees of the air carrier. For example, although the Administrator demonstrated some indicia of lack of Sky Way control over its Shorts aircrews, there was contrary testimony by Sky Way and M&N personnel; and there is no evidence that the crews were not properly trained or qualified (with the isolated exception of the first officers on several Caribex runs that did not have required type ratings, and this circumstance was quickly corrected, apparently by Sky Way).

appears to be contrary to the FAA's intent behind operational control requirements, the record does not make it clear that, for example, this arrangement resulted in widespread circumstances of aircraft being released in contravention of appropriate requirements. Part of our uncertainty is due to the lack of clarity regarding to what extent Sky Way flight crews can independently exercise proper operational control. Our point here is that we are unable to conclude, on this record, the full extent to which Sky Way may have abrogated, and M&N may have improperly appropriated, other operational control functions.³²

In light of these considerations, and after a thorough review of the record, we cannot grant the Administrator's appeal and reinstate the sanction revocation. One of the Administrator's primary case theories, and a theme throughout the testimony from her witnesses, was that M&N and Sky Way were knowingly involved in secretive schemes to impermissibly "rent" or "sell" air carrier certificates. Although we would,

³² Similarly, although M&N tested and subsequently fired the M&N-paid Shorts pilot who tested positive for narcotics, and, again, this appears to be somewhat contrary to expectations, the un rebutted evidence also indicates that Sky Way's chief pilot was integrally involved in the decision-making intended to drug test and efficiently remove this pilot from Sky Way's flight operations.

obviously, have a negative view of such circumstances, there is too little hard evidence, and enough doubt, that such was the motivation on the part of Sky Way or M&N for us to make it a basis for our decision.³³

The Administrator's argument that we must defer to her choice of revocation is, under the circumstances, unavailing. First, Muzquiz is inapplicable because not all of the violations alleged by the Administrator can fairly be said to have been proved. Similarly, we are mindful of the approach taken by the Administrator in the Darby case, and the fact that there, unlike here, the certificated operator appeared to cede all effective operational control to the non-certificated entity. Nonetheless, in Darby, the Administrator sought only an indefinite suspension of Darby Aviation's certificate. The Administrator's efforts to distinguish that decision and the case here is unpersuasive, in part because she provides scant analysis specific to each respondent. Finally, Inspector Weitzenhoffer provided only the most cursory justification for revocation. Tr. at 692-693. For these reasons, and because we conclude that the Administrator has not sufficiently demonstrated actual lack of qualification, we do not think her

³³ The law judge also clearly did not share the Administrator's assessment in this regard.

choice of sanction in this case is entitled to deference.

Nevertheless, we note that respondents have been afforded a hearing on the Administrator's revocation orders, and, on the basis of that record, they have been demonstrated to have exercised inappropriate control, or ceded such control, in contravention of regulatory requirements. The record is also clear that the Administrator's experts on operational control have good faith concerns about systemic and actual deficiencies in the joint operations of Sky Way and M&N (and Sky Way and Caribex), as well as their capability to conduct any future operations appropriately under the applicable FAA requirements.³⁴

On balance, the record demonstrates actual and apparent

³⁴ We note that the Administrator presented minimal evidence regarding the particulars of the N410MN flights, M&N removed the aircraft from AFG's certificate prior to the Administrator's revocation of AFG's certificate, and the Administrator did not rebut the claim by M&N that it removed N410MN from AFG's certificate not for purposes of deception but because it was actively working with the FAA to obtain permanent approval to operate the aircraft on its own certificate. We also note that the unrebutted evidence in this case is that the aircraft displayed next to the main cabin door a notice that indicates, "THIS AIRCRAFT IS OPERATED BY AMERICAN FLIGHT GROUP INC, ANNAPOLIS, MD, CERT#BVIA649C," and both the San Juan and Baltimore FSDOs were aware of, and the Baltimore FSDO approved of, M&N's affiliation with AFG. In any event, most of the Administrator's fact-based arguments on appeal regarding M&N operational control matters pertain to the M&N/Sky Way Shorts operations. While it is clear that the FAA does not approve now of the AFG/M&N agreements regarding N410MN, and we agree, we discern insufficient evidence to warrant revocation on the basis of this prior FAA-approved AFG/M&N relationship.

inadequacies in respondents' operations, specifically pertaining to operational control, that should, in the interest of safety, be corrected to the satisfaction of the Administrator.³⁵ Under such circumstances, and after carefully reviewing the mitigating and exculpatory evidence presented by respondents, we deny respondents' appeals. In sum, safety in air commerce and the public interest requires that we affirm the law judge's order modifying sanction in this case to an indefinite suspension.³⁶

³⁵ We reject, as a factual matter, respondent Sky Way's argument that M&N and Caribex were legitimately operating as indirect air carriers, for, contrary to Mr. Garofalo's analysis, the facts in this record demonstrate that M&N was impermissibly performing operational control functions, such as assigning crews and aircraft, that Sky Way was not authorized to cede to any entity. We also note that we find the analogy to DOT economic regulatory precedent to be completely inapposite and unpersuasive.

³⁶ As we said in Darby, we expect the FAA will "provide [respondents] with an opportunity to demonstrate that [they] can operate future Part 135 flights without impermissibly giving up [or usurping] operational control." NTSB Order No. EA-5159 at 25 (2005). Similarly, we do not view this result as a de facto revocation of respondents' certificates; we expect the FAA and respondents will work together in good faith, as expeditiously as practical, to resolve the Administrator's concerns and demonstrate to her satisfaction that respondents can properly operate in accordance with their certificates and regulatory requirements. In this regard, we specifically note our conviction that the FAA's apparent lack of response to M&N's correspondence -- while perhaps understandable in terms of preparation for an adversarial hearing -- is an unacceptable paradigm for the communications we expect will be necessary between the FAA, as regulator, and the respondents in this case.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's and Respondents' appeals are denied; and
2. The law judge's order, to the extent not inconsistent with this opinion and order, is affirmed.

ROSENKER, Chairman, SUMWALT, Vice Chairman, and HIGGINS, Member of the Board, concurred in the above opinion and order. HERSMAN, Member of the Board, did not concur, and submitted the following dissenting statement.

Member Hersman, Dissenting:

The FAA has established requirements for certificate holders. In this case, the record is clear that neither M&N nor Sky Way complied with those requirements. There are other certificate holders cited in this complex case, AFG and Caribex, which demonstrate a similar lack of compliance with FAA regulations and guidance.

The industry is well aware of operational control issues post-Teterboro. Entities such as Darby, American Air Network, American Flight Group, and others have been the focus of FAA enforcement efforts. The FAA issued guidance on Operational Control in June of 2005 and has asked its POIs to review the appropriateness of existing contractual operations. Much has been written about operational control in industry publications; information has been circulated by trade groups and attorneys; and during the last 18 months, operational control has been the subject of many discussions in the charter community.

I disagree with the assessment that we do not have sufficient evidence to revoke M&N and Sky Way's certificates. M&N placed an aircraft, N410MN, on AFG's certificate and paid an administrative fee to utilize their own aircraft, which they then offered for hire (as evidenced by quotes issued on M&N letterhead in April 2006). When it was clear that AFG was in trouble for demonstrated lack of operational control over the aircraft listed on its Part 135 operation specifications, M&N

removed N410MN from the AFG certificate. M&N then continued a relationship with Sky Way that had some of the same hallmarks. Sky Way, for their part, permitted M&N to assign crews and aircraft, in contravention of regulatory requirements (FAA Order 8400.10, paragraph 1145).

We revoke the certificates of airmen on the basis of non-compliance with guidelines. We also deny the petitions of respondents that miss appeal deadlines. Why do we permit so much latitude in complying with regulations in this situation? There is too much slop in the system. FAA is making an attempt to regain some discipline and I think we should not only defer to them, but support them in this endeavor.

Although I do not agree, I understand why a decision has been made to "split the baby" with respect to this consolidated case. FAA is not entirely without blame. The FAA has issued guidance on Operational Control via a notice which expired in June 2006 and was not re-issued. They delayed issuing promised specific information about Operational Control and postponed publishing this information yet again in October. Issuing regulations could assist their POIs and operators in avoiding this situation altogether. The FAA has also been inconsistent in the penalties they seek against operators. For example, while they request a revocation in this situation, the situation in Darby/Platinum may have merited a revocation, but they did not ask for one.

While I applaud the efforts of the team looking into charter relationships, the FAA is bringing forward enforcement actions that exist in many cases with the blessing of the local POI. This is not to say that FAA inspectors or the companies they oversee are seeking to contravene existing regulations, but I would suggest that they are non-compliant with FAA regulations because business interests have dominated regulatory compliance. The USPS is not responsible for M&N needing additional lift. M&N bid on a contract that it did not have the lift to support. Lack of resources on their part does not constitute a rationale for skirting the rules.

The issue of operational control is one of details. This case is one of details to be sure. However, at the end of the day, whether it is through malice, incompetence or disregard, if you cannot get the details right, you should not be operating an airline.